Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
NORCOM COMMUNICATIONS CORPORATION	)	WTB DOCKET NO. 98-181
	)	
Business Radio Station License WNQF836; SMR Stations WZA770, WNBW505, WNAJ380, WNRU218 and WNJU965, NY, NY/Long Island Area	)	
	)	
Application to Modify Business Radio Station License WNQF836, NY, NY/Long Island Area	)	File Number A008053
	)	
Application to Modify SMR Radio Station License WZA770, NY, NY/Long Island Area	)	File Number C002479
	)	
Application to Modify SMR Station License WNBW505, NY, NY/Long Island Area	)	File Number C002480
	)	
ASSOCIATION FOR EAST END LAND MOBILE COVERAGE Business Radio Station License WPAT918, NY, NY/Long Island Area	)	
	)	
LMR 900 ASSOCIATION OF SUFFOLK Business Radio Station License WNXT323, NY, NY/Long Island Area	)	
	)	
METRO NY LMR ASSOCIATION Business Radio Station License WPAZ643, NY, NY/Long Island Area	)	
	)	
NY LMR ASSOCIATION Business Radio Station License WPAP734, NY, NY/Long Island Area	)	
	)	
WIRELESS COMMUNICATIONS ASSOCIATION OF SUFFOLK COUNTY Business Radio Station License WPAT910, NY, NY/Long Island Area	)	

To: Honorable John M. Frysiak, Administrative Law Judge

WIRELESS TELECOMMUNICATIONS BUREAU'S CONSOLIDATED OPPOSITION TO MOTIONS TO DELETE

1. On December 9, 1998, Norcom Communications Corporation ("Norcom") filed a "Motion to Delete and/or Change Issues." On that same date, the Association For East End Land Mobile Coverage, the LMR 900 Association of Suffolk, the Metro NY LMR Association, the NY LMR Association, and the Wireless Communications Association of Suffolk County (collectively, the "Associations") filed a "Consolidated Motion to Delete and/or Change Issues." The Acting Chief, Wireless Telecommunications Bureau ("Bureau"), by his attorneys, now opposes both motions.

2. In their respective motions to delete, both Norcom and the Associations request deletion of the unauthorized transfer of control[1] issue specified in the *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture*, FCC 98-252 (released October 14, 1998) ("*HDO*"). Norcom and the Associations both argue that the Commission used the wrong legal standard in specifying that issue. In its motion to delete, Norcom also requests deletion of the abuse of process[2] issue specified against it because it alleges that its relationship to the Associations was disclosed when the Associations' applications were granted. Both motions must be denied because they are, in reality, unauthorized requests for reconsideration of the *HDO*.

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[1] The full text of this issue is: "To determine whether Norcom, East End, LMR 900, Metro, NY and/or Suffolk violated Section 310(d) of the Act by engaging in unauthorized transfers of control of Stations WPAT918, WNXT323, WPAZ643, WPAP734, and/or WPAT910."

[2] The full text of this issue is: "To determine whether Norcom has abused the Commission's processes in connection with the creation and/or control of the Associations and/or with the control and/or operation of the Associations' stations."

3. "[W]here a matter has been fully considered in the HDO, and clear instructions given therein, the [Presiding Judge] is bound by that instruction." *See Richardson Broadcasting Group*, 5 FCC Rcd 5285, at footnote 22 (Rev. Bd. 1990), *citing Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966). In this case, the Commission clearly considered the question of what standard would govern in determining whether there was an unauthorized transfer of control, and determined that the test in *Intermountain Microwave*, 24 RR 983 (1963) was the applicable test for determining the existence of an unauthorized transfer of control. *HDO*, ¶8. The Presiding Judge lacks the authority to modify or reconsider the Commission's explicit ruling. Moreover, Section 1.106(a)(1) of the Commission's Rules prohibits petitions for reconsideration of hearing designation orders, except to the extent that a party is denied the right to participate in a hearing. Therefore, both motions to delete should be dismissed as procedurally defective.

4. The arguments propounded by Norcom and the Associations also fail on their merits. Norcom and the Associations contend that the transfer of control issue is defective because the *Intermountain Microwave* test only applies to Commercial Mobile Radio Service (CMRS) stations and not to Private Mobile Radio Service (PMRS) stations, such as those licensed to the Associations. Norcom and the Associations also argue that the proper standard for PMRS stations is a standard announced in *Motorola, Inc*, Application File No. 507505, et al. (Chief, Private Radio Bureau, 1985)[3]. Norcom and the Associations cite *CMRS Fourth*

[3] This is an unpublished decision of the former Private Radio Bureau, whose functions are now with the Wireless Telecommunications Bureau. A copy is attached for the convenience of the Presiding Judge and the parties.

Report and Order, 9 FCC Rcd 7123, at paragraph 20 (1994), to support this proposition. They also claim in their motions to delete that the Bureau restated the *Motorola, Inc.*, standard in a public notice released on March 3, 1998 (although the public notice was actually issued in 1988).[4]

5. In the *CMRS Fourth Report and Order*, *supra*, the Commission determined that the *Intermountain Microwave* standard, applies to CMRS stations formerly classified as PMRS, but it did not reach the question of whether the *Intermountain Microwave* standard applies to stations still classified as PMRS, such as those licensed to the Associations. However, in *Marc Sobel*, 12 FCC Rcd 3298, 3299 (1997),[5] and in the *HDO* in this case, the Commission found that the *Intermountain Microwave* standard applies to PMRS stations. Therefore, the claim of Norcom and the Associations that the *Intermountain Microwave* standard does not apply to PMRS stations is wholly erroneous, and the transfer of control issue cannot be deleted on such a basis.

6. Moreover, the arguments of Norcom and the Associations ignore two important points. First, neither Norcom nor the Associations have shown that there is any inconsistency between *Motorola* and *Intermountain Microwave*. The existence of an unauthorized transfer

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[4] No such public notice was issued on March 3, 1998. As the Associations' counsel has informally advised the Bureau, the correct date for the public notice concerning the *Motorola, Inc.*, standard is March 3, 1988.

[5] *Sobel* involved both CMRS and PMRS stations. The Commission applied the *Intermountain Microwave* test to both types of stations.

of control depends upon the facts of the relationship between Norcom and the Associations. Second, another issue in this case seeks to determine whether the Associations' stations were being used to provide for-profit service to paying customers. If the Presiding Judge finds that the stations were used in such a manner, the stations would be operating in a manner virtually indistinguishable from a for-profit station. Under those circumstances, it would be illogical to conclude that *Intermountain Microwave* did not apply to those stations.

7. In addition, Norcom claims that the abuse of process issue should be deleted. Norcom argues that the Commission has overlooked "key facts" which "prove that Norcom did not abuse the Commission's processes . . . ."[6] Specifically, Norcom claims that it fully disclosed its relationship with the Associations during the original application process in 1991-1992.[7] The Bureau disputes this claim and intends to offer evidence at the hearing that Norcom did not make a full disclosure of its relationship with the Associations at the time the Associations' original applications were filed. For example, the disclosure described by Norcom did not reveal that prior to the grant of the Associations' original applications, Norcom and the Associations had already entered into management contracts which placed all financial risks upon Norcom and placed no limit on the fees Norcom could charge the end users of the Associations stations. Similarly, the disclosure did not reveal that Norcom would

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[6] Norcom Motion, p. 5.

[7] To support this claim Norcom attached "Exhibit A" and "Exhibit B"to its "Motion to Delete and/or Change Issues." However, "Exhibit A" and "Exhibit B" were not attached to the copy served upon the Bureau by facsimile. The Bureau obtained copies of "Exhibit A" and "Exhibit B" through the Electronic Comment Filing System.

enter into contracts with resellers to permit resellers to resell service over the Associations' stations on a for-profit basis.

8. In any event, it is clear that deletion of the abuse of process issue is not warranted. As stated in *Community Broadcasting Company, Inc., et al.*, 488 FCC 2d 487, at paragraph 3 (Rev.Bd. 1974), "[P]etitions to delete issues . . . will not be granted absent a compelling showing of some unusual circumstances, such as where material information is overlooked, misconstrued or not considered in the determination to specify the issue." Norcom has made no such showing. Moreover, there is a factual dispute between the Bureau and Norcom. This factual dispute should not be resolved through the instant motion to delete issues. The Review Board has stated that "[D]esignated factual issues are better resolved in an evidentiary hearing than by interlocutory pleadings . . . [T]o proceed otherwise would be disruptive to the orderly and efficient administration of the Commission's business." *Theodore Granik et al*, 6 FCC 2d 252, (Rev. Bd. 1965) at paragraph 6. Consequently, the abuse of process issue should not be deleted on the basis of Norcom's disputed factual claim that it fully disclosed its relationship with the Associations during the original application process.

9. Therefore, the arguments propounded by Norcom and the Associations fail both procedurally and substantively. Accordingly, the Bureau respectfully requests that the

Presiding Judge deny the referenced motions to delete filed by Norcom and the Associations .

Respectfully Submitted,
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December 21, 1998

Before the
Federal Communications Commission
Washington, D. C. 20554

In the Matter of	)	
	)	
Applications of Motorola, Inc., for 800 MHz Specialized Mobile Radio Trunked Systems in California, New York, New Jersey, Maryland and Virginia	)	File Nos. 507505, 507475, 507473, 507333, 507330, 507509, 508813, 508124, 508046, 507477, 507511
Application of Motorola, Inc., for Assignment of Authorization of Specialized Mobile Radio Station WRG-816 at Mount Tamalpais, California	)	File No. 558891

ORDER

Issued: July 30, 1985

1. The Private Radio Bureau has before it for consideration Petitions to Dismiss Applications of Motorola Inc., filed by Atcomm, Inc. and Big Rock Communications, Inc. The petitions were filed on October 1, 1984, and are addressed to applications filed by Motorola for new 800 MHz Trunked Specialized Mobile Radio (SMR) systems located in California at Mt. Diablo, McKittrick, Montrose, Corona, Escondido, San Diego and Grass Valley. The Petitions to Dismiss are based on allegations that Motorola, through the use of management contracts, has assumed de facto control of SMR systems licensed to Comven, Inc., Port Services Company, and Mt. Tamalpais Communications, in violation of Section 310(d) of the Communications Act of 1934, as amended. This section of the Act requires Commission approval prior to any transfers of control of a facility licensed by the Commission. 1/ It is alleged by petitioners that this unauthorized assumption of control resulted in a violation of Rule 90.627(b) which precludes, with limited exceptions, the authorization to a licensee of more than one SMR system within 40 miles until all of the channels already assigned to that licensee are at least 80% loaded. Motorola has systems in the areas in question and these systems are not all 80% loaded. The Petitioners contend that these unauthorized transfers of control of SMR systems to Motorola raise character issues concerning Motorola's qualifications to be a Commission licensee. Also before us is a Petition for Reconsideration of the denial of a Petition to Dismiss Motorola's applications for new trunked SMR systems in Hamilton and West Orange, New Jersey; Huntington, New York; Towson, Maryland and Bull Run, Virginia, based on the alleged character issues arising out of Motorola's management.

1/ Petitioners initially alleged that Motorola also had a management contract with Paging Network of San Francisco, Inc. Paging Network filed Comments stating that it never had a management contract with Motorola. Petitioners subsequently conceded this fact in their January 30, 1985, "Reply to Opposition to Joint Petition to Dismiss Application."

contracts in California. 2/ The Petition for Reconsideration was filed on January 18, 1985.

2. On December 27, 1984, petitioners also filed a Petition to Dismiss the application for assignment of authorization of Motorola for SMR system WRG-816, licensed to Mt. Tamalpais Communications, located at Mt. Tamalpais, California. 3/ Petitioners allege that Motorola contracted to receive 100 percent of the system revenues while the license remained in the name of Mt. Tamalpais Communications. The petitioners assert that the purpose of Motorola's unauthorized assumption of control and its delayed filing for assignment of authorization was to protect its application for a new system at Mt. Diablo. They also argue that Motorola delayed filing the assignment application, although it had already acquired the Mt. Tamalpais system, so that Mt. Tamalpais' application would not be removed from the top of the waiting list for additional frequencies. 4/

Background

3. Petitoners claim Motorola's management contract constitutes a de facto transfer of system control. They further allege that under these contracts Motorola purchases the central controller from the licensee, provides the marketing, customer billing and and system maintenance and pays the site rental in return for 70 to 80 percent of the gross receipts of a system. In support of these assertions, petitioners have submitted affidavits from Peter C. Padelford, General Partner of Big Rock Communications, and Johnny L. Champ, President of Motek Engineering Inc., stating that Motorola personnel offered them management contracts consistent with the above terms. Petitioners have also submitted a copy of an internal Motorola publication referring to Motorola-managed SMR systems as "our" systems, and a user agreement between Motorola and an end-user of a Motorola-managed SMR system which identifies Motorola as the owner-licensee.

2/ The Bureau denied the Petition to Dismiss on December 19, 1984, because the allegations of violations in California did not provide a basis for delaying the grants of Motorola's applications in New York, New Jersey, Maryland and Virginia.

3/ For a complete list of the significant filings in this case, see the attached Appendix. The twenty-eighth filing was submitted on July 1, 1985.

4/ Applications for trunked channels at 816-821/861-866 MHz are processed on a first come, first served basis. If applications cannot be processed because of lack of spectrum, they are placed on a waiting list and grants are made as channels become available. A licensee is removed from the waiting list when channels are granted to it; this includes channels received through assignment or transfer.

4. Motorola makes the following arguments in its Opposition to the Petitions to Dismiss its California, New York, New Jersey, Maryland and Virginia applications. First, it maintains that management contracts are common methods for SMR entrepreneurs to acquire the technical, marketing or financial expertise necessary to attract users. Second, it maintains these contracts provide efficient service to the end-users of private carrier (SMR) systems and optimize the return on the licensee's investment. Motorola also contends that the licensees which contract for its management services maintain the requisite degree of control over their facilities and fulfill their responsibilities as Commission licensees. This is reflected, Motorola contends, in the fact that these licensees continue to own the controller and transmitters and continue to exercise over-all supervision over the operation of their SMR systems. Motorola also submits the affidavit of Richard Wycoff, the author of the newsletter, who states that "our" referred to systems using Motorola equipment.

5. In its Opposition to the Petition to Dismiss its application for assignment of SMR station WRG-816, Motorola acknowledges that although it wanted to acquire WRG-816, it also wanted to retain its eligibility to prosecute its Mt. Diablo application. Motorola indicates it entered into negotiations to buy WRG-816 in late 1983 and signed an SMR Asset Purchase Agreement in February 1984 with a target date for the transfer of title of April 1, 1984. It anticipated that the system loading at that time would allow the maintenance of Motorola's Mt. Diablo application. Motorola concedes that it has "billed and operated" the system since April 1, 1984, and states in its submission to the Commission that it has had "de facto control of station WRG-816" since that date. Motorola also states that it did not file the assignment application for WRG-816 until April 4, 1984, and that the application was withdrawn on May 4, 1984, because Motorola believed the system was not loaded and that if the application were granted it would be precluded from pursuing its Mt. Diablo application.

6. Despite the withdrawal of the assignment application, Motorola states it orally agreed to continue to operate WRG-816 and received 100 percent of the system revenues in exchange for a monthly fee paid to Mt. Tamalpais Communications, pursuant to a Site Rental Agreement signed on March 6, 1984. Subsequently on November 27, 1984, Motorola resubmitted its application for assignment of WRG-816. Motorola states although this situation may show impropriety, it is atypical of the way it conducts its business and is a breech of its standard operating procedures. It maintains it resulted from a series of employee errors and personnel changes. Motorola also states that to prevent a reoccurrence of this type of activity it has implemented a continuous review of pending management agreements and revised its end-user agreements to reflect that it is the manager of an SMR system. Motorola requests that it be allowed to pursue its Mt. Diablo and other applications, if its assignment application is denied.

7. In order to evaulate the nature of the management contracts under dispute, on February 12, 1985, the Bureau requested Motorola to submit copies of all executed or proposed management contracts with Comven, Inc., Port Services Company and Mt. Tamalpais Communications. On February 26 Motorola submitted executed contracts concerning the management of eleven 800 MHz trunked SMR systems licensed to Comven, Inc. One management contract, covering seven systems, was dated January 4, 1984. The remaining four contracts were dated December 5, 1984. Motorola also furnished an unexecuted copy of its standard management contract which it had offered to Port Services Company. Motorola stated that negotiations with Port Services had broken off and no agreement was entered into. In addition, Motorola provided the undated SMR Asset Purchase and Site Lease Agreements which were executed with Mt. Tamalpais Communications on March 6, 1984. Motorola also provided its generic SMR Asset Purchase Agreement which includes provisions for Motorola to manage an SMR system until the Commission has approved the assignment of the license. Finally, Motorola submitted its revised SMR Mobile Radio User Agreement which it has been using since June 1984. The end-user agreement identifies Motorola as either the owner/licensee or manager of the system.

8. The terms of the executed management contracts with Comven are substantially the same as the standard contract offered to Port Services Company. The terms reflect that the licensee will provide the central controller and repeaters for the system, i.e., the necessary radio equipment. The services provided by Motorola under contract are installation, including antennas and cables; testing of equipment; payment of antenna site charges; maintenance; marketing, promotion and sales; customer billings and collections; and updates to systems software. Any costs or additional equipment and supplies associated with these services or the operation of the SMR system are to be paid for or provided by Motorola. As compensation for these services Motorola receives 70 percent of the monthly gross collections received from end-user customers of the systems. 5/ The contracts are effective for ten years and are renewable at Motorola's sole option for an additional five years. Any default or breach of the management agreement which is not remedied within 30 days is grounds for termination by either party.

5/ The management contract for Comven, Inc.'s 10 channel SMR station KNDB-962 located at Monument Peak, California provides that Motorola will receive 65 percent of the gross receipts.

9. In addition to the above services provided by Motorola, provisions which were not included in the January 4 management contract were added to the December 5 contracts. These provisions require Motorola to notify all end-users that Comven, Inc., is the system licensee and that service is being offered under a management contract with Motorola serving as the agent for Comven, Inc. Motorola is also required to ensure Comven can access the system's central controller.

10. The generic Asset Purchase Agreement, which Motorola states it uses when it wishes to acquire an existing SMR system through assignment, contains a provision incorporating a contemporaneous management contract wherein Motorola manages the purchased system pending Commission approval of an assignment application in return for 100 percent of the revenues. Although the Asset Purchase Agreement entered into by Motorola and Mt. Tamalpais Communications did not contain such a provision, their Site Lease Agreement provided, in paragraph 20, that if Commission approval had not been obtained by the time the agreement was executed, Motorola would operate the system under Mt. Tamalpais' license until the assignment was granted by the Commission. In addition, Motorola stated that after the assignment application was withdrawn on May 4, 1984, Motorola and Mt. Tamalpais orally agreed that Motorola would manage the system in return for 100 percent of the revenues.

11. On April 24, 1985, the Bureau requested Motorola to provide additional information. Motorola was asked to describe in detail the nature and extent of Comven's responsibilities as a licensee with respect to each of the management contracts previously submitted. The letter also requested Motorola to provide the basis for its view that these agreements did not constitute transfers of control or violations of Rule 90.627(b). Motorola responded on May 15, 1985. It pointed out that the agreements with Comven provided that Motorola would perform all its managerial services under the supervision and pursuant to the instructions of Comven. Motorola further noted that Comven continues to be the licensee of the system and is the entity responsible to the Commission for the operation of the system and compliance with Commission rules. Motorola further pointed to the additions to the December 5, 1984 agreements providing it would notify all users that Comven was the system licensee, requiring it to provide Comven with the information necessary to access the systems' central controllers, and mandating the involvement of Comven in establishing the price schedule and any modifications thereto.

12. With respect to the question of transfer of control, Motorola asserted that its management contracts with Comven were consistent with the Commission's policy. Thus, it stated that Motorola had no ability or right to determine Comven's policies or operations, or to dominate its corporate affairs, since it managed the system under the supervision and in accordance with the instructions of Comven under agreements which covered day-to-day management activities. Motorola further set forth that it held no stock in Comven and was not a major creditor of Comven.

13. On April 29, 1985, the Bureau addressed questions to Comven. The questions concerned the officers, directors, shareholders and employees of Comven, the purchase price and financing arrangements for the central controllers and repeaters for the Comven systems managed by Motorola and the duties performed by Comven to exercise control of its systems. Comven responded on May 22, 1985. It also submitted additional information, orally requested by the Bureau, on June 4, 1985. The responses revealed that Comven is a publicly held corporation with over 150 shareholders. The two major owners are James E. Treach and David I. Jellum, who each own 28.5% of the company and are the Chief Executive Officer and President, respectively. Comven has 31 employees variously located in Phoenix, San Diego, Dallas and South Gate, California. Eight of them, including Jellum and Treach, have previously been employed by Motorola. Comven stated that it owned the central controllers and repeaters on its systems managed by Motorola, that they were purchased for various prices between $36,000 and $38,541 and that all the purchases were financed by Associates Capital Services Corporation, a subsidiary of Associates Corporation of North America. Finally, Comven set out the specific aspects of its agreements with Motorola which it contends allows it to maintain regular oversight of Motorola's activities. According to Comven, the following are among those factors: (1) ownership of the central controller and repeaters; (2) access to the central controller which allows it to prevent operation on the system; (3) receipt of copies of end user contracts, monthly computer analyses of billing generated and copies of work tickets for service and maintenance on the system; (4) the assignment of Marcia Jellum to full-time responsibility for overseeing th management of the systems.

Discussion

14. Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), provides that no station license can be transferred, assigned, or disposed of in any manner either directly or by transfer of control of a corporation holding the license without the prior approval of the Commission. This requirement is implemented in the Private Radio Services by Rule 90.153. The Act contemplates every form of control, actual or legal, direct or indirect, negative or affirmative, so that actual control may exist by virtue of special circumstances although there is no legal control in the formal sense. Lorain Journal Company v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). See also, Rochester Telephone Corp. v. U.S., 23 F. Supp. 634 (W.D.N.Y. 1938), aff'd 307 U.S. 125 (1939). In determining whether a transfer of control has occurred within the meaning of the Act, the Commission looks beyond mere title or legal control and considers the totality of the circumstances to ascertain where actual control lies. Stereo Broadcasters, Inc., 87 FCC 2d 87 (1981); George E. Cameron, Jr. Communications, 91 FCC 2d 870 (Rev. Bd. 1982).

15. The Commission has recognized that with the diversity of fact patterns which can arise in the business world, no precise formula for evaluating questions of transfer of control can be set forth. News International, PLC, 97 FCC 2d 349 (1984). However, it has said that "[g]enerally the principle indicia of control examined to determine whether an unauthorized transfer of control has occurred are control of policies regarding (a) the finances of the station; (b) personnel matters and (c) programming." S.W. Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

16. The issues in this case are (1) whether Motorola's management contracts with Comven places Motorola in control of these Comven systems without the requisite authorization of assignment from the Commission and (2) if such an unauthorized assignment has occurred, whether there has also been a violation of the 40 mile rule with respect to Motorola's systems. Although there are numerous cases involving transfers of control in the broadcast area, this is a case of first impression in the private radio area. Obviously, the question of programming does not arise in a radio service which serves as a conduit for the communications of other parties. Since the Commission has different interests with respect to the broadcast services than it does for private radio, a different standard from that enunciated above may be appropriate. In this regard, the Commission has recognized that broadcast licensees have a responsibility for the content of the information which they disseminate that radio services which serve as mere conduits or transmission links do not. Cablecom General, Inc., 87 FCC 2d 784 (1981).

17. The Commission has dealt with the issue of licensee control of a radio system in the Private Radio Services when discussing multiple licensed and cooperative use radio systems. 6/ In Multiple Licensing - Safety and Special Radio Services, Docket No. 18921, 24 FCC 2d 510, 519 (1970), the Commission said that the licensee should have a proprietary interest, as an owner or lessee, in its system's equipment which would not be taken over by third parties that it hired to dispatch. This would give the licensee the ability to exercise the degree of control of its system which was consistent with its status as a licensee and the regulation of the private radio service. In subsequent decisions, the Commission did not alter this basic test for determining licensee control of a system. 7/

6/ See Rules 90.185 and 90.179, respectively.

7/ For a complete history of these proceedings see, Tentative Decision and Further Inquiry and Notice of Proposed Rule Making, FCC 81-263, 46 Fed. Reg 32038 (June 19, 1981); Report and Order, Docket No. 18921, 89 FCC 2d 766 (1982) and Memorandum Opinion and Order on Reconsideration, Docket No. 18921, 93 FCC 2d 1127 (1983).

Finally, the Commission concluded that the determining factor concerning licensee control of a system is "that the licensee in fact exercises the supervision the system requires." Memorandum Opinion and Order on Reconsideration, supra n. 6, at 1133.

18. These standards are useful when examining the question of licensee control and management contracts for SMR systems. With respect to cooperative radio systems, the Commission has said that it will "allow licensees to contract with third parties to serve as the licensees' agents and handle day-to-day operations of their systems." John S. Landes, 77 FCC 2d 287, 291 (1980). In the broadcast services, the Commission has held that it is concerned with "the basic policies and ultimate control of the station. Day-to-day operation by an agent or employee, guided by policies set by the licensee are not inconsistent with [Section 310(d) of] the Act." S.W. Texas Public Broadcasting Council, supra, at 715 and n.2. In National Association of Regulatory Utility Commissioners v. FCC, 525 FCC 2d 630 (D.C. Cir 1976), which affirmed, inter alia, the Commission's authority to create and regulate private carrier systems, such as the ones at issue here, the court acknowledged the Commission's broad discretion to experiment with new regulatory approaches for the purpose of encouraging and maximizing the use of this new radio spectrum. The Commission began licensing SMR systems in 1978 but it took some time for the SMRS business to become well established. More recently we have witnessed an explosive growth in the SMR industry. Entrepreneurs have invested in SMR systems in all major cities throughout the country. As the SMR industry has matured, licensees have inevitably sought to avail themselves of a variety of methods to operate and manage their systems. In this dynamic and developing marketplace we wish to allow maximum flexibility to these entrepreneurs, consistent with the regulatory restraints imposed by the Communications Act. We also wish to assure licensees may employ a variety of options so that they may provide an efficient and effective communications service to the public as quickly as possible. In light of these public policy objectives, and as a general proposition, we see no reason why SMR licensees should be precluded from hiring third parties to manage their systems provided that the licensees retain a proprietary interest, either as owner or lessee, in the system's equipment and exercise the supervision the system requires.

19. Turning to the specifics of the Motorola management contracts with Comven, the Bureau finds that an unauthorized transfer of control has not occurred. Comven owns both the repeaters and the central controller for each system. The financing is with a finance company which is independent from Motorola. Additionally, there is no evidence that Motorola sells any equipment to Comven for a reduced price in return for managing the system. Petitioners have not presented any facts which distinguish Comven's purchase of Motorola equipment from any other SMR licensee purchasing equipment from

Motorola. 8/ Further, the contracts provide that Motorola must perform its functions pursuant to the supervision and instructions of Comven. Should this fail to occur Comven can terminate the agreement and exercise full responsibility over all matters involving the operation of the systems. See S.W. Texas Public Broadcasting Council, supra, at 716.

20. Since Comven owns the systems and exercises appropriate supervisory control over them, we are not concerned with the division of gross revenues for management services. As long as a licensee maintains the requisite degree of control necessary and consistent with its status as a licensee, we will not question its business judgment concerning the agreements into which it enters.

21. While we have concluded that Motorola's management agreements with Comven did not result in an unauthorized transfer of control, we cannot reach the same conclusion with respect to its involvement with Station WRG-816, licensed to Mt. Tamalpais Communications. Motorola has stated that pursuant to a site rental agreement in which it paid Mt. Tamalpais a monthly fee, Mt. Tamalpais transferred authority to maintain and operate its system to Motorola on April 1, 1984. On that date, the end-user agreements were transferred from Mt. Tamalpais' name to Motorola, Motorola began operating the system, billing the users and receiving 100 percent of the revenues generated by the system. Motorola itself has characterized this situation as a "de facto transfer of control."

22. Motorola argues that this unauthorized transfer of control occurred because no management agreement was entered into. However, the standard management contract submitted by Motorola, which it states it uses in situations where it is acquiring a system, provides for essentially the same terms as the oral agreement it had with Mt. Tamalpais, including Motorola's receipt of 100 percent of the proceeds. We fail to see how reducing such an agreement to writing removes it from the category of unauthorized transfer of control. With respect to management contracts executed in connection with the assignment of an SMR system, as the Commission stated in Stereo Broadcasters, Inc., supra, at 94, "when a prospective purchaser exercises management authority, premature transfer of control may result." It is clear that Mt. Tamalpais' April 1 transfer of its proprietary interest in and control of WRG-816 to Motorola for a monthly rental fee constituted an unauthorized transfer of control.

8/ While petitioners have intimated that such may be the case, they have presented no evidence to that effect.

23. In Storer Broadcasters, Inc., supra, the Commission denied a renewal application where it found that the parties had conducted a continuing effort to conceal an unauthorized transfer of control from the Commission. However, in Deer Lodge Broadcasting, Inc., 86 FCC 2d 1066 (1981), where the Commission determined that there was no intent to violate the Act or rules and no attempt to conceal the transfer, the Commission concuded that a forfeiture and short term renewal were appropriate. The facts in this case do not indicate that Motorola or Mt. Tamalpais entered into their agreement with an intention to violate the Act or Rules. A management contract in the Specialized Mobile Radio Service is a new development in the SMR community. As a result, licensees had few guidelines upon which to base their transaction. Moreover, Motorola has provided complete details concerning its relationship with Mt. Tamalpais and has admitted the impropriety of its conduct. Thus, while approval of Motorola's belated request for assignment of WRG-816 is inappropriate, we conclude, consistent with Deer Lodge, that the ultimate sanction of denial of Mt. Tamalpais' pending renewal application is not warranted.

24. Accordingly, Motorola's application for the assignment of station WRG-816 will be dismissed. Mt. Tamalpais' renewal application for WRG-816 will be renewed for only a one year term. Finally, Mt. Tamalpais' eligibility as a waiting list applicant for additional frequencies for WRG-816 terminated on April 1, 1984, the date Mt. Tamalpais transferred control of the station to Motorola. Therefore, Mt. Tamalpais' waiting list application is dismissed.

Conclusion

25. The Bureau has determined that it is permissible for licensees to hire entities to manage their SMR systems, provided that licensees do not contract away their control of the system. At a minimum, this means that a licensee must have a bona fide proprietary interest and that it exercise the supervision over the system that it requires consistent with its status as licensee. Based on this standard we have found that the management contracts executed between Motorola and Comven were proper. However, we also find that Motorola assumed de facto control of WRG-816, licensed to Mt. Tamalpais, Inc., without Commission approval. In spite of the guidelines provided in this order, we note that, as the Commission has reiterated many times, the question of whether a transfer of control has occurred can only be determined after an evaluation of the facts in each case. Therefore, in doubtful and borderline cases, doubt should be resolved by bringing the complete facts of the proposed transaction to the Commission's attention for a ruling in advance of any consummation of the transaction. WWIZ, Inc., 36 FCC 561, 578 (1964), recon. denied 37 FCC 685, aff'd sub nom. Lorain Journal Company v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

26. Accordingly, the Atcomm and Big Rock Petitions to Dismiss filed against the Motorola applications for SMR systems located in California at Mt. Diablo, McKittrick, Montrose, Corona, Escondido, San Diego and Grass Valley are DENIED; 9/ the Atcomm and Big Rock Petition for Reconsideration of the Bureau's denial of their Petition to Dismiss Motorola applications for SMR systems in Hamilton and West Orange, New Jersey; Huntington, New York; Towson, Maryland and Bull Run, Virginia is DENIED and the Atcomm and Big Rock Petition to Dismiss the assignment application of Motorola is GRANTED. Therefore, Motorola's assignment application for SMR sytem WRG-816 licensed to Mt. Tamalpais Communications is DISMISSED, Mt. Tamalpais' waiting list application for additional frequencies is DISMISSED and Mt. Tamalpais' renewal application will be granted for a one year term.

Robert S. Foosaner
Chief, Private Radio Bureau

9/ Of the applications listed, only the one for San Diego was selected in the lottery. It was granted conditionally pending the outcome of this proceeding.

Certificate of Service

I, Arlene Cook, certify that, on December 21, 1998, a copy of the foregoing "Wireless Telecommunications Bureau's Consolidated Opposition to Motions to Delete" was sent by facsimile and first class mail to:

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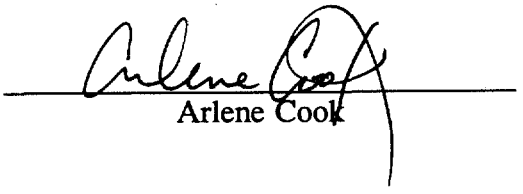

Arlene Cook